



Update

Superannuation & Funds Management

4 August 2010

Cooper Review - Employers' Perspective

The much anticipated final report of the Cooper Review was released on Monday, 5 July 2010 (**the Report**). The review into the governance, efficiency, structure and operation of Australia's superannuation system has been comprehensive. It impacts not only on the superannuation industry but also on the obligations of employers contributing to superannuation funds on behalf of their employees. For a more comprehensive summary of the recommendations of the Cooper Review please see our [Superannuation Update – Cooper Review](#).

This Update provides an overview of the recommendations in the Report that relate to employer obligations. The Report suggests a two year transition period and as many of the reforms are significant, advanced planning to implement them will be critical to their success.

It is now up to the Government to consider the Report's recommendations (all 117 of them) and give its response. Comments from Minister Bowen suggest that such a response will come after consulting the industry on key proposals. Given that a federal election is imminent it is possible that the Government's response will not be available prior to that election.

The Report recognises that the choice architecture framework has failed to deliver the competition and cost savings originally anticipated and accepts that a large proportion of the Australian population is disengaged with their superannuation and likely to remain so. On that basis the Report divides the superannuation industry into four sectors:

- **MySuper** – for those who are disengaged with their superannuation;
- **Choice** – for those who are engaged with their superannuation and want to exercise a choice;
- **Eligible Rollover Funds (ERFs)**; and
- **Self Managed Superannuation Funds (SMSFs)**.

This is a realistic approach and recognises the different needs of different people within the system.

MYSUPER

There has already been a lot of information and discussion concerning the new MySuper product. The Report acknowledges that MySuper is based on the existing default investment options but claims that the current structure will be enhanced with the objective of achieving better member outcomes. This is to be achieved by shifting the existing emphasis from the superannuation industry to the member.

Trustee duties

Trustees that offer a MySuper product must comply with the following:

- *Investments* - formulate and give effect to a single diversified investment strategy at an overall cost aimed at optimising fund member's financial best interests as reflected in the net investment return over the longer term; and
- *Scale* - actively examine and conclude annually if the MySuper product they offer has sufficient scale as a stand alone product, based on asset values and member numbers to determine whether it will continue providing optimal benefits to members.

These additional duties need to be compared to the existing duties a Trustee of a superannuation fund currently takes on under common law and under SIS.

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Employer Default Funds

Recommendations relating to employer default funds include:

- Amending the *Superannuation Guarantee (Administration) Act 1992 (SG Act)* so only a MySuper product will be eligible to be a default fund nominated by an employer.
- Amending the relevant legislation so only MySuper products are eligible to be nominated, and **all** MySuper products are able to be nominated, as default funds in industrial awards approved by Fair Work Australia.

Opening up default funds in industrial awards to all MySuper products will create a level playing field and presents a real threat to industry funds who currently occupy this space. The recommendation that the Productivity Commission review the process by which default funds are nominated in industrial awards to determine whether that process is sufficiently open and competitive in 2012, adds to that concern.

Successor funds

Where a successor fund is a MySuper product to a default fund under an industrial award it will automatically be accepted as the default fund under that award, removing any impediment to consolidation. This addresses a concern relating to the modern award changes which failed to deal with the impact of successor fund transfers on default funds named in an Award. However, it is not clear whether this would extend to all successor fund transfers or just those involving a MySuper product.

Defined Benefit Funds

If the Fund is a hybrid fund the MySuper criteria must be met for accumulation members for the Fund to be accepted as a default fund under the SG Act concerning those members.

Where a member holds both a defined benefit and accumulation benefit as part of a defined benefit fund's benefit design and the accumulation benefit is not required in order to meet the employers' SG Act obligations, then the MySuper criteria does not have to be met concerning those members.¹

EQUAL REPRESENTATION

Part 9 of SIS deals with equal representation and applies only to standard employer sponsored funds. Although the report is not directly recommending removal of equal representation it seems to be trying to water it down by using the need for independent directors on the board. For example the Report recommends that SIS be amended so that:

- equal representation is non-mandatory, and that requirement should be removed from the constitution of trustee companies;
- where the board does not have equal representation it must have a majority of "non-associated" trustee-directors;
- no less than one-third of the total number of member representatives and employer representatives are non-associated directors.

The not for profit sector of the superannuation industry has already raised concerns regarding these recommendations.

DEFINED BENEFITS

The following recommendations are made specifically in relation to defined benefit (DB) funds:

- APRA to issue a prudential standard focussing on funding to protect vested benefits, specifying the time period within which a DB Fund that is in an unsatisfactory financial position must be restored to a satisfactory financial position in the same way SIS presently addresses insolvency of Funds and minimum requisite benefits.
- Amend SIS so DB Funds that are technically insolvent are not permitted to accept SG Act contributions unless the Fund Actuary and Trustee agree it is reasonable to believe the Fund will be restored to solvency within a prescribed period under SIS.
- Define "superannuation contributions" in the Corporations Act to clarify that DB contributions have the same protection as accumulation contributions. DB funds should automatically qualify as "default funds" for SG Act purposes concerning defined benefits provided to members, provided the Fund meets the requirements of the SG Act to receive contributions.

The trustee of DB Funds (or sub-plans) presently permitted to self insure death and TPD benefits should be permitted to continue to do so.

1. Recommendation 6.15 of the Cooper Report.

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SUPER STREAM

SuperStream is a package of measures intended to enhance the current “back office” of superannuation. It includes new standards to improve quality of data provided by employers, to use tax file numbers (**TFNs**) as a primary identifier and requires the use of technology to improve processing efficiency. It also includes improvements to the way fund to fund rollovers should be processed and the way contributions are made.

The recommendations are as follows:

Provision of information by Employer

The Report recommends amendment to legislation to require employers when dealing with accumulation members to provide the Fund (or Clearing House) with its ABN and as a minimum the following information:

- **first contribution** - the full name, date of birth, current address, email address (if known), mobile phone number (if known) and TFN of the employee, date of commencement of employment and the amount of the contribution being remitted in respect of that employee.
- **subsequent contributions** - the employees name, TFN and the amount being contributed. Where the contribution is paid by a Clearing House the Fund SPIN should also be given.
- If the employer fails to comply with the above it becomes liable for an administrative financial penalty payable to the Australian Taxation Office (**ATO**) for each employee and each day it fails to meet the obligations. Obviously this is potentially a significant penalty depending on the number of employees involved and the period of the default.
- However, the ATO does have some discretion about collection of the penalty. Alternatively the Report recommends that if the penalty regime is unacceptable that an employer who fails to meet these standards should be deemed to have **not** met their SG obligations and be subject to the relevant penalties under the SG Act.
- Funds should be prohibited from accepting members where insufficient identification data (i.e. the full name, address and date or birth) have not been provided and should not be able to accept any contributions where they are unable to identify which member they apply to.

Obviously this would overcome data issues experienced by many Funds who have inadequate information concerning members. However, how this would be enforced is unclear. Obviously if the Fund can simply reject accepting the member or any contributions that are provided by employers without the requisite information, that solves the problem for the Fund. It does not however solve the problem for the employer and employee concerned.

Failure of the Employee to Provide a TFN or Identification Details to Employer

In these circumstances the Report recommends that the employer be able to electronically give the employee identification details it holds to the ATO with the relevant contribution. The ATO would then treat the contribution as unclaimed money. If the TFN is subsequently provided the ATO would remit the contribution it holds to the employee's default fund with the employee's TFN and identification details.

The Report recommends that the ATO should establish an employment webpage where an employer can register the tax status of a new employee in lieu of completing the TFN declaration form, and can simultaneously advise the Fund to which superannuation contributions would be paid. The ATO would then communicate the new member details to the Fund electronically.

Standardised Form

The Report recommends APRA establish a stakeholder group to develop on-line forms covering all the common processes between employers and Fund members and Fund to Fund communications such as rollovers. It also recommends that the Government should mandate use of these forms unless it is satisfied there is “near universal voluntary take-up”.

Fees Payable by the Employer

If the Employer makes a contribution other than in electronic form with the prescribed details to identify the member, the Report recommends that the employer be required to pay the Fund a prescribed fee. The fee would apply, for example where the contribution was paid by cheque, or where payment is received without information to adequately identify the member it relates to.

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The recommendation suggests an education campaign concerning the fee and an appropriate transition phase. The report does not address issues concerning small businesses that may be reluctant or unable to adopt the technology needed to advance contributions electronically. It is unclear who would be paying for the education campaign for the employers. From a trustee perspective, maintaining good relations with the employer sponsors is vital and this would undoubtedly necessitate the Trustees taking action to ensure their employer sponsors are aware of the consequences of not submitting contributions electronically.

Employers' obligations regarding contributions

The Report recommends amendments to legislation relating to employer obligations:

- An employer would be required to remit salary sacrifice and superannuation guarantee contributions no less frequently than members after tax contributions.
- Once SuperStream is implemented the timing of SG payments should be aligned with the employers' payroll cycles. This would mean employees paid fortnightly would have their SG contributions paid to their superannuation fund fortnightly instead of quarterly as required by the SG Act. This would be a significant and welcome change, from the perspective of members and superannuation funds. It may be less welcome for employers. Due to compounding interest more frequent payments of SG contributions could significantly add to the end retirement benefit.
- The employer will be required to report on each payslip the amount of superannuation paid to the employer's superannuation fund, whether that is the SG contribution, salary sacrifice or after tax contributions.

If an employee makes a complaint to the ATO of non payment of an SG contribution the ATO should continue on a risk assessed basis to assess the employers' compliance with its SG Act obligations for all of its employees and not just the complainant.

CONCLUSION

The impact of the Report on the superannuation industry will depend on the Government's response and the outcome of the upcoming election. If the recommendations are adopted employers will need to ensure that they are properly informed of their new obligations and the consequences of not meeting those obligations. It can only be hoped that the consultation process will be able to take what is good in the Report and overcome what is unnecessary.

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